

FILED _____

AT _____ O'clock ___ M
CLERK, DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

STATE OF IDAHO,)
)
)
Plaintiff,)
)
vs.)
)
MARK ANDREW WING)
DOB: 07-17-58)
SSN: 447-64-4293)
IDOC: 97189)
)
Defendant.)

Case No. **CRF 2009 15494**

**ORDER DENYING I.C.R. 35
MOTION AND NOTICE OF
RIGHT TO APPEAL**

On February 1, 2011, MARK ANDREW WING (Wing) was sentenced by this Court as follows:

AGGRAVATED ASSAULT, (a felony), Idaho Code § I. C. 18-901, 18-905(a and/or b), committed on July 21, 2009 – to the custody of the Idaho State Board of Correction for a fixed term of FOUR (4) years followed by an indeterminate term of ONE (1) years, for a total term not to exceed FIVE (5) years.

Sentencing Disposition and Notice of Right to Appeal, p. 1. On that document this Court noted by interlineation (in addition to announcing on the record at the February 1, 2011, hearing), that the “Only reason this is not all fixed is to provide some incentive to do well in prison programs.” *Id.* (underlining in original). The aggravated assault to which Wing pled guilty, was witnessed by Donald Brooks (Brooks), the on-site manager at Tamarack RV Park, where the crime occurred. Brooks testified: “I saw a gentleman that I don’t know running and Mark (Wing) chasing him with a sword over his head.” Preliminary Hearing Transcript, p. 39, LI. 16-18. Wing was swinging the sword back and forth above

his head. *Id.*, LI. 24-25. The other person had fallen to the ground behind a tree, and Wing was swinging the sword at the other person but hitting the tree. *Id.*, p. 40, L. 2 – p. 41, L. 4. These are the facts from a disinterested, impartial observer. The intended victim, Aaron Fulk (Fulk) also testified. Fulk went to the Tamarack RV Park on the day in question because his brother asked him to because he “needed protection.” *Id.*, p. 4, LI. 1-3. Fulk went there to tell Wing to leave his brother alone, to quit going over to his brother’s house, and to quit beating him up and robbing him. *Id.*, LI. 15-19. Wing has at various times has claimed self-defense against Fulk. Even if this Court were to throw out all of Fulk’s testimony, the Court is left with the testimony of a dispassionate observer (Brooks) who saw Wing taking swings at his intended victim, with a very large knife in Wing’s hands, only to hit a small tree, which was all that was between Wing and his intended victim. Even if at some *earlier* point in time Fulk somehow threatened Wing (a point certainly not established by the evidence), Wing was *later* caught swinging a sword at a defenseless person. This undeniable fact also impinges upon Wing’s later claim that his attorney failed to interview a crucial witness (discussed below), known as the “Reverend”. Even if the “Reverend” could be located and would testify about an earlier threat by the later victim, such testimony would not in any way furnish a defense to Wing. In the first instance, even if the victim verbally threatened Wing, Wing proceeded to bring a large knife to bear on the situation. Wing is not justified in using any degree of force clearly in excess of that apparently and reasonably necessary under the existing facts and circumstances. ICJI 1518, citing *State v. Scroggins*, 91 Idaho 847, 433 P.2d 117 (1967). In the second instance, ICJI 1517 reads: “When there is no longer any reasonable appearance of danger, the right of self-defense ends.” Wing has no self-defense claim at the point in time where Wing is caught taking whacks at his victim who is

at the time cowering behind a small tree.

On March 14, 2011, Wing, through counsel, filed his Notice of Appeal.

On May 27, 2011, Wing, through counsel, timely filed the instant I.C.R. 35 Motion requesting that “this Court reduce the Defendant’s sentence in whatever manner it deems appropriate.” Wing bases this motion on no other information. In his motion, Wing requested a hearing, which was scheduled for September 14, 2011. In preparing for that hearing, the Court reviewed Wing’s file in its entirety.

Following review of Wing’s file, the Court determines that a hearing is not necessary. A motion to modify a sentence “shall be considered and determined by the court without the admission of additional testimony and without oral argument, unless otherwise ordered by the court in its discretion.” I.C.R. 35; see *State v. Copenhagen*, 129 Idaho 494, 496, 927, P.2d 884, 886 (1996); *State v. James*, 112 Idaho 239, 242, 731 P.2d 234, 2370 (Ct.App. 1986) (it is the defendant’s burden to present any additional evidence and the court cannot abuse its discretion in “...unduly limiting the information considered in deciding a Rule 35 motion”); *State v. Puga*, 114 Idaho 117, 118, 753 P.2d 1263, 1264 (Ct.App. 1987). Even though a hearing was requested, “[t]he decision whether to conduct a hearing on an I.C.R. 35 motion to reduce a legally-imposed sentence is directed to the sound discretion of the district court.” *State v. Peterson*, 126 Idaho 522, 525, 887 P.2d 67, 70 (Ct.App. 1994); citing *State v. Findeisen*, 119 Idaho 903, 811 P.2d 513 (Ct.App. 1991). The Court has reviewed the Motion for Reconsideration of Sentence Pursuant to I.C.R. 35, the Court minutes and the pre-sentence report. There is nothing that could be presented at a hearing that would be of benefit to the Court. A hearing would only waste counsel’s and the Court’s time.

A motion to reduce sentence is a motion for leniency. *State v. Strand*, 137 Idaho

457, 463, 50 P.3d 472, 478 (2002); *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999). The decision to grant or deny leniency is left to the sound discretion of the court. *Id.*, *Strand*; *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct.App. 1989)

A motion to reduce an otherwise lawful sentence is addressed to the sound discretion of the sentencing court. *State v. Arambula*, 97 Idaho 627, 550 P.2d 130 (1976). Such a motion is essentially a plea for leniency, which may be granted if the sentence originally imposed was unduly severe. *State v. Lopez*. 106 Idaho 447, 680 P.2d 869 (Ct.App. 1984).

* * *

However, if the sentence is not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with his motion.

State v. Forde, 113 Idaho 21, 22, 740 P.2d 63 (Ct. App. 1987). See also *State v. Adams*, 137 Idaho 275, 278, 47 P.3d 778, 781 (Ct.App. 2002).

For a sentence to be considered “reasonable” at the time of sentencing the court must consider the objectives of sentencing: whether confinement is necessary to accomplish the objective of protection of society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution applicable to the case. *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct.App. 1982). This requires the court focus on “...the nature of the offense, the character of the offender, and the protection of the public interest.” *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct.App. 1982).

Applying the above criteria to Wing’s I.C.R. 35 Motion results in the following.

On July 21, 2009, Wing was arrested for resisting and obstructing an officer. On July 22, 2009, Wing was also charged with the felony crime Attempted Murder in the First Degree. Complaint, p. 1. Also on July 22, 2009, Wing applied for a public defender, and the Office of the Kootenai County Public Defender was appointed to represent Wing. Bond was established in the amount of \$250,000 at first appearances on July 22, 2009.

A preliminary hearing was held on September 29, 2009, at the conclusion of which, Wing was bound over to stand trial on these charges in district court. A transcript

of that hearing was prepared and was reviewed by this Court on more than one occasion prior to Wing's February 1, 2011, sentencing. On November 19, 2009, Wing appeared for his arraignment by this Court. Wing pled not guilty and his trial was scheduled for February 3, 2010.

On November 20, 2009, Wing filed a Motion for Reduction of Bond. That motion was heard on December 29, 2011, and this Court denied bond. This date was the first occasion for this Court to review the preliminary hearing transcript. The Court also noted Wing had twenty-two prior convictions, was a high risk, and was charged with a violent crime. At all times prior to sentencing, Wing remained in custody.

There are a variety of reasons Wing's sentencing did not occur until February 1, 2011. These delays resulted in Wing having been in custody for 561 days at the time of sentencing.

First, on August 6, 2009, this Court ordered a mental health evaluation of Wing pursuant to I.C. § 18-210 and 18-211, ordering the Director of Health and Welfare to designate a licensed psychiatrist or psychologist to examine and report on Wing's mental health conditions. On August 11, 2009, in a letter to the Court, Marie Parkman, chief Psychologist for Region 1, Health and Welfare, refused to perform the I.C. § 18-211 examination, reporting that due to the attempted murder charge: "The type of forensic examination required for this type of serious criminal charge is outside the scope of this agency to perform and outside my scope of practice." While it is unknown why the nature of the charge would affect the Department of Health and Welfare's ability to assess the defendant's ability to stand trial (ability to understand the proceedings against him and assist counsel with his defense, I.C. § 18-211), Parkman also noted: "Additionally, should the examination recommend care and treatment in a facility pursuant to 18-212, this man would need to be committed to the Idaho Department of Corrections, Secure Medical

Facility, as his behaviors would be considered too dangerous for him to be safely treated in a state hospital setting.” Wing, through counsel, requested that Daniel Hayes, Ph.D, perform the evaluation. This Court ordered Wing be transported to Hayes for an evaluation on September 1, 2009.

Second, on January 27, 2010, Wing, through counsel, filed another Motion for evaluation under I.C. § 18-210 and 18-211. On January 29, 2010, the Court ordered Health and Welfare to conduct such examination. On February 9, 2010, Hayes conducted this evaluation. As a result of that evaluation, on March 18, 2010, and again on March 22, 2010, Wing was involuntarily committed to the Idaho Department of Correction for treatment pursuant to I.C. § 18-212(2). On April 12, 2010, this Court scheduled Wing’s jury trial to begin on September 7, 2010, with a pre-trial conference scheduled for September 2, 2010. On August 13, 2010, Wing was ordered to be transported back to Kootenai County Jail because “the evaluation did not result in evidence of any psychological disorder or dysfunction sufficient to prevent MARK WING from understanding the charges against him and consult with his attorney in his defense.” Order to Transport, p. 1.

Third, at the September 2, 2010, pre-trial conference, Wing requested a continuance as he now wanted to hire private counsel, Henry Madsen (Madsen), who was representing Wing in another matter. The continuance was granted, Wing waived his right to a speedy trial and Wing’s jury trial was scheduled for October 12, 2010. At the September 30, 2010, pre-trial conference, Wing stated he wanted the new attorney because his present attorney Anne Taylor, had only talked to him three times, the most recent being the week prior, and he’d been waiting nine months to talk to Henry Madsen but Madsen’s calendar is all full. The Court left Wing’s matter set for trial. Trial began on October 12, 2010.

Fourth, at the end of the first day of trial, the Court declared a mistrial, because the State's witness, Aaron Fulk, disregarded the Court's pre-trial order and referred to the sword as a potential murder weapon. Following the discharge of the jury, counsel discussed a plea to aggravated assault with a deadly weapon. The Court told Wing clearly and directly regardless of what the charge was, that prison or at the very least a retained jurisdiction was likely and that probation was "highly unlikely". On October 22, 2010, Wing pled guilty to aggravated assault (with no weapons enhancement), and a presentence investigation was ordered with sentencing scheduled December 15, 2010.

Fifth, on December 15, 2010, the day of the sentencing hearing, Wing, through counsel, filed a motion to continue the sentencing hearing "on the grounds that Mr. Wing has directed counsel to file a motion to withdraw his plea of guilty and counsel needs additional time to draft the motion and request a hearing date; also the Pre-sentence report was just received by counsel and Mr. Wing this week and there has not been enough time to meaningfully review the document; and medical records are just being made available today for counsel for Mr. Wing to pick up, review, and submit pertinent documents to the Court for consideration." Wing's motion for a continuance was granted and Wing's Motion to Withdraw Guilty Plea was scheduled for January 19, 2011, and sentencing was re-scheduled for February 1, 2011. At the January 19, 2011, hearing on Wing's Motion to Withdraw Guilty Plea, Wing was represented by new conflict public defender, Christopher Schwartz. At that hearing, Wing took the witness stand. Wing claimed he was not guilty of a crime, claimed that his attorney and her investigator Mark Durant did not contact the witnesses who would testify in his favor, specifically a "Reverend," and that if he had known they had never interviewed that witness, he wouldn't have plead guilty. The Court denied Wing's Motion to Withdraw Guilty Plea because no indication was given by Wing as to what the "Reverend" might testify about,

and the “Reverend” did not appear at the hearing to discuss what his testimony at trial might have been. The Court pointed out to Wing the elevated standard for withdrawing a guilty plea after the presentence report has been issued. Sentencing took place on February 1, 2011.

At sentencing, the presentence report, which Wing had the opportunity to correct, lists Wing has gone by thirteen different aliases. Wing has two separate 1985 convictions for felony aggravated assault in Arizona; felony possession of marijuana in Arizona in 1993; did a year and a half in prison for being a felon in possession of a weapon in 1995; a felony fugitive arrest in 2002 in Nebraska; and numerous misdemeanor crimes, fourteen of which Wing admitted were accurate, several more he claimed were not. Of those Wing admitted, there is a damage to property charge in 1983, obstructing police in 1994, assault and battery in 2006, driving under the influence in 2007; and petit theft in 2009. While Wing disputes many of these charges, 117 charges were listed as having been filed in four different states. Wing has suffered a closed head injury for which he receives SSI disability payments. Wing refused to participate in his substance abuse evaluation. Wing had a current prescription for Cymbalta for depression from his brain injury. Presentence Report, p. 25. The presentence author wrote that Wing in his interview was loud, rambling and aggressive. The presentence author wrote:

There is little evidence that the defendant’s self-preoccupied thinking and assertive bearing have ever been effectively controlled in his lifetime. The volume and character of his arrests and charges over the past 35 years evince it.

Id., p. 28. The presentence author expressed concern that Wing would be a good candidate for a retained jurisdiction due to his mental health issues (*Id.*, p. 29), and that Wing’s lack of ability to self-administer his mental health medications may explain some of his behavior and crimes. *Id.*, p. 29.

Submitted at sentencing were two letters from Wing's former victims. One, Leah, is an individual whose mother was living with Wing in 2005. Leah was beaten by Wing and at Wing's court proceedings in that case, Leah claims Wing invented other witnesses. Leah watched Wing beat her brothers and others on multiple occasions. The other former victim, Kim Wojton was living with Wing. Wojton was beaten by Wing many times and left him in 2006. Wing then threatened to kill Kim's daughter and kidnap her grandson.

Mental health records one year before the events in question diagnose Major Depressive Disorder Recurrent, Severe; Alcohol Abuse; Traumatic Brain Injury, and note:

Client is experiencing overwhelming depressive and anxious symptoms which consist of the following; severe bouts of depression, severe anxiety, explosive temper, panic attacks, vacillating between inability to sleep and oversleeping, decreased appetite, weight gain, severe short-term and long-term memory deficits, suicidal ideation, feeling hopeless, worthless, no motivation, racing thoughts and depressed mood every day all day. Client also appears to self-medicate through the use of alcohol and occasional marijuana use.

Abundant Wellness Center, November 14, 2008, pp. 1-2. Wing's records during his pre-trial confinement for restoration of competency showed depressive disorder, cognitive disorder and anti-social personality disorder, and note:

It should be noted that Mr. Wing's easily triggered irritability demonstrated at times during this evaluation could be disruptive if displayed in a courtroom or during consultation with his attorney. He manifested this irritability when describing the reasons he "fired" the previous attorney that had been representing him in his current criminal charges. This seeming inclination to react irritably does not reflect a lack of capacity to proceed associated with a serious mental disorder, and likely represents an aspect of his antisocial functioning. Mr. Wing also demonstrated an ability to inhibit this tendency during this evaluation in response to structured reminders to do so.

Correctional Medical Services August 10, 2010, evaluation, p. 11. That same report also read:

Prominent in Mr. Wing's psychological functioning is evidence of a long-

standing pattern of antisocial behavior including a disregard of social norms (his documented history of arrests, including arrests for assaults), self-misrepresentation (his self-report regarding history of substance use and education during this evaluation; documented use of many aliases), acceptance of limited if any responsibility for his negative behaviors, a strong tendency to externalize blame, and easily triggered irritability.

Id., p. 10. Hayes' report diagnosed Wing with cognitive disorders likely from his head trauma, major depressive disorder, panic attacks with agoraphobia, and the possibility of post-traumatic stress disorder. Hayes noted Wing "...can become easily upset and is at times emotionally labile", and "It may be difficult for him to calm himself down."

September 2, 2009, Report of Daniel Hayes, p. 5. Wing's VERA Risk Score on his Pre-Trial services inventory was a negative eighteen, probably the most unfavorable risk assessment score this Court has ever seen on a criminal defendant.

Even after months of forced sobriety due to incarceration, this Court observed Wing as at times argumentative and combative in Court, often irrational, at times incapable of listening to direction, and at all times completely incapable of coming to grips with what he had done. Wing was consistently diagnosed as an alcoholic. At the time of this charge Wing had done nothing to address his alcoholism. To the extent Wing has a mental health condition he virtually guaranteed his instability in that condition with his alcohol use preceding the events in question.

This Court witnessed Wing free from alcohol in a controlled setting, for over a period of nearly a year and a half. Even in that controlled setting and sober, Wing is obviously an angry man, and a man who will self-medicate with alcohol if able to obtain alcohol, and a man who will not take the medications he has been prescribed. Wing has had a history of being explosive, very violent, very manipulative, and virtually uncontrollable. There is no way Wing would be an acceptable candidate for probation. Wing has violated his probation several times in the past, once to the point his felony

prison sentence was imposed. There is no doubt in this Court's estimation that Wing, if placed on probation, would violate that probation, in all likelihood, with another violent offense. The Court must place the protection of the public paramount. *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct.App. 1982). The Court cannot meet that obligation by placing Wing on probation. Wing has provided not one shred of evidence to make this Court believe that he would perform any better in public compared to how he has performed in custody over the past year and a half.

There is no way Wing's sentence should be reduced in any way. Wing received a huge gift from the deputy prosecutor who, for some reason, reduced the charge down to aggravated assault *without* a deadly weapons enhancement. As mentioned above, the only reason the Court imposed one year of indeterminate time was to provide Wing with some incentive to conduct himself appropriately in prison.

The sentence imposed on February 1, 2011, was and is an appropriate sentence given Wing's social and criminal history and the crime for which sentence was imposed. A lesser sentence would depreciate the seriousness of Wing's crimes. This Court concludes that the sentence imposed was and is necessary for the protection of society and the deterrence of Wing and others.

IT IS THEREFORE ORDERED that Wing's I.C.R. 35 Motion is **DENIED**.

NOTICE OF RIGHT TO APPEAL

YOU, MARK ANDREW WING, ARE HEREBY NOTIFIED that you have a right to appeal this order to the Idaho Supreme Court. Any notice of appeal must be filed within forty-two (42) days of the entry of the written order in this matter.

YOU ARE FURTHER NOTIFIED that if you are unable to pay the costs of an appeal, you have the right to apply for leave to appeal *in forma pauperis* or to apply for the appointment of counsel at public expense. If you have questions concerning your right

to appeal, you should consult your present lawyer, if any.

DATED this 12th day of September, 2011.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of September, 2011 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney - Chris Schwartz
Prosecuting Attorney - Donna Gardner

MARK ANDREW WING
IDOC # 97189

Idaho Department of Correction
Records Division (certified copy)
Fax: (208) 327-7445

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: _____, Deputy